No. 14,813

In the

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant,

v.

MARY V. HEAVINGHAM, Special Administratrix of the Estate of Arthur V. Heavingham, Deceased,

Appellee.

Appellant's Brief

Appeal from the Judgment of the United States District Court for the Northern District of California, Southern Division

Hon. SHERRILL HALBERT, Judge

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STATUTES

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STATEMENT OF JURISDICTION AND PROCEEDINGS

Plaintiff and appellee's decedent, Arthur V. Heavingham, while in the course of his employment as a brakeman for appellant, Southern Pacific Company, was killed on February 24, 1954, when the locomotive in which he was riding collided with a caboose attached to the rear of a standing train near Davis, Yolo County, California.

Appellee, the surviving widow and special administratrix of decedent, commenced this death action for $250,000 damages on March 5, 1954, on behalf of herself as the surviving widow and Kathleen Heavingham as the surviving minor child of decedent. She claimed under the Federal Employers' Liability Act, 45 USCA §51, et seq.

The jurisdiction of the Court below was sustained by §6 of the Federal Employers' Liability Act (45 USCA §56).

The case was tried by the Court, sitting with a jury, on February 2, 3 and 4, 1955. On February 4, 1955, the jury returned a verdict for plaintiff and appellee in the amount of $75,000 (R. 9).[1] Judgment on the verdict was entered February 7, 1955 (R. 10-11).

It was and is the appellant's position, both here and below, that the evidence was insufficient to create a jury question on the issue of conscious pain and suffering by decedent and that therefore the Court below was in error in submitting this issue to the jury over appellant's objection, and in refusing to give appellant's proposed instruction No. 9, withdrawing this element of damages from consideration by the jury. The instructions in question are set out in full under the heading "Specification of Errors" on pages 11-12 below.

On February 10, 1955, appellant served and filed its notice of motion for new trial (R. 11-13). The motion was heard on April 22, 1955, and was denied by order of the Court below on May 12, 1955 (R. 13-14). Thereupon, and within the time allowed by law, defendant, the appellant, perfected this appeal, by notice of appeal filed June 1, 1955 (R. 14).

The jurisdiction of this Court is sustained by 28 USC §§ 1291, 1294, 2107 and the Federal Rules of Civil Procedure, Rule 73.

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[1] The numbers in parentheses preceded by the letter "R" indicate pages in the printed record.

STATEMENT OF THE PLEADINGS

The complaint (R. 3-6) sets forth plaintiff's legal capacity to maintain the action as administratrix of decedent (this was stipulated to by defendant and appellant (R. 95)), the corporate existence of the defendant and the nature of its business as a common carrier by railroad in interstate commerce near the Station of Davis, County of Yolo, State of California. Paragraph IV of the complaint reads as follows:

> "This action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 USCA Section 51, et seq."

The complaint alleges the time and place of the accident and the employee status of appellee's decedent followed by the allegation charging negligent operation of the train on which appellee's decedent was riding and of the stopped train against which it collided, and that appellee's decedent died as a proximate result of such negligence.

Paragraph VIII of the complaint alleges:

> "Between the time of said accident and injuries sustained by decedent and his death he was conscious and suffered excruciating pain and mental anguish, to plaintiff's damage herein in the sum of $50,000.00."

Paragraphs IX, X and XI of the complaint allege:

> "Plaintiff is the surviving widow of said decedent, and Kathleen Heavingham is the minor surviving child of said decedent.
>
> "Plaintiff and said minor child were entirely dependent upon the earnings of said decedent for their maintenance and support."
>
> "At the time of the death of decedent aforesaid, said decedent was a well and able-bodied man of the age of 56 years, and was earning and receiving from his employment with defendant a regular salary of approxi-

mately $600.00 per month, all of which he contributed to the support of plaintiff and said minor surviving child, Kathleen Heavingham."

"By reason of the facts hereinbefore set forth, plaintiff has been generally damaged in the sum of $200,000.00."

The answer (R. 7-9) admits the corporate existence of the defendant and that it was a carrier engaged in the business of a common carrier by railroad in interstate and intrastate commerce in the State of California and in other states. It admits that at the time and place of the accident the decedent Arthur V. Heavingham was employed by it as head brakeman on a freight train being operated by it between stations at Suisun and Roseville, California, and that pursuant to his duties decedent was riding in the locomotive of said freight train. The answer further admits that the freight train upon which decedent was employed was carelessly and negligently operated into and against the rear of another freight train resulting in the death of decedent Arthur V. Heavingham. Appellant by its answer denied the other allegations of the complaint and set up the defense of contributory negligence on the part of appellee's decedent.

STATEMENT OF FACTS

A. The Accident

The only witness to testify regarding the accident in which appellee's decedent was killed was the fireman George E. Maasen. He testified as follows:

The accident occurred on February 24, 1954 (R. 23) at about 2:30 a.m. (R. 24) near Davis, California (R. 23). Appellee's decedent, Maasen and engineer Joe Cooper were the occupants in the cab of a mallet engine, which is of the cab ahead type (R. 23). This engine was pulling about 29 freight cars (R. 23).

The engine was equipped with three seat boxes, the engineer's, the fireman's and the brakeman's (R. 27-28). As the engine approached Davis, the engineer was operating the engine, looking out of the window ahead (R. 28). Appellee's decedent was seated on the brakeman's seat box which was located in the front of the engine, slightly to the left of the center of the cab (R. 27-28).

The weather was dark and foggy and visibility varied with the density of the fog (R. 30). Immediately before the accident visibility was limited to two or three car lengths, a car length being approximately fifty feet (R. 30).

The engineer, fireman and appellee's decedent were all calling out the block signals as they saw them (R. 29). This is done by all of the occupants of the cab of the engine as a cross check to insure accuracy (R. 50). The next to last signal that the engine passed was yellow (R. 30) which indicated that at that moment the next signal beyond was red (R. 69). A yellow signal is a caution signal to be prepared to stop before reaching the next home signal (R. 68). A red signal indicates that the area between that signal and the next one is occupied (R. 69).

Immediately before the collision the engineer had reduced speed by use of the engine brakes but had not applied the train brakes (R. 31). A red signal suddenly appeared out of the fog and the engineer immediately applied the train brakes in emergency which applied the brakes on every car in the train in order to bring the train to a stop as fast as possible (R. 31). As or very shortly after the red signal was observed fireman Maasen saw the red marker lights on each side of the caboose ahead (R. 31). As soon as appellee's decedent saw the marker lights, at a distance of about 2 car lengths, he got up from his seat box and walked over to the engineer's side. Fireman Maasen got up on his seat box,

with his back to the front of the engine to shut off the oil valve which would put out the fire in the engine. Appellee's decedent returned to Maasen's side and stood almost in front of him (R. 31-32).

Fireman Maasen was thrown out of the window of the engine by the impact (R. 32). His next recollection was when he was on his hands and knees opposite the engine across two sets of tracks (R. 33) about 20 to 25 feet from the engine (R. 61). The speed of the engine at impact was 12 to 15 miles per hour (R. 51).

Fireman Maasen described his activities following the accident as follows: (R. 33-35)

> "I looked back to see what had happened, and I still saw the fire flickering in the firebox, so I went back over to the tank, back over to the engine, and got on top of the tank and shut the oil valve off which put out the fire in the firebox.
>
> "Then I walked up the running board to the cab window on my side to try to get in there, and the steam was so hot I couldn't get near it. And I went back to what they call a monkey deck, I never heard it called anything else. It is a deck between the engine and the tank, and there's a ladder getting up to that—on each side.
>
> "I went back to the monkey deck, crawled up the ladder and went up the engineer's side, crawled up his ladder as far as the window, and the steam was so hot there I couldn't get near it. And I got back down and I saw somebody down there and he asked me something; he said something to me. I don't know what it was. I told him to give me a hand; I have got a fireman—a brakeman and an engineer in there in that cab, help me get them out.
>
> "He said, 'Well, I am the engineer.' Of course, I had never seen the man with his hat and glasses off, and it was dark, too, so I a good close look at him (*sic*)

and I said, 'I am sure you got out, Joe.' So I said—he asked me is the brakeman in there. 'I guess he is in there, I don't know, I haven't seen him.'

"So I went around my side again and tried to get in the ventilator, which is just above the cab, and the steam there was boiling out. Then I thought of the blow-down valve which releases the steam from the boiler. So I walked along the top of the engine at the other end and I opened that and I got back down on the ground. And that is all I could do.

"I couldn't—I tried to get in the cab on each side again and I couldn't get in, couldn't get up in front of the window.

"So by that time I met the conductor and evidently he had called the ambulance—I don't know who called him or when, but I heard the siren of the ambulance and you couldn't see the highway it was so foggy.

"So then the ambulance drivers came over and we started back to the ambulance. The ambulance drivers and the conductor helped the engineer and I over. And I happened to hear the steam quit blowing so I told them, 'I am going back and look in that cab.'

"They said, 'No, come over to the ambulance.'

"I said, 'No, I am going back and look in the cab.' So I went back and got up on the running board on my side, walked up to the window again, and in the meantime, on my way back alongside the engine a brakeman handed me a fusee. Mr. Hepperle explained what the fusee is. That was the only light I had, so I lit that and looked in the window when I got up there and I saw Mr. Heavingham. I didn't know whether—I wasn't sure whether he was dead or not, but I got down, I went back to the engineer and I said, 'Well, Art's gone.' That was Mr. Heavingham's name, that is what we called him.

"He said 'What do you mean? Did he—isn't he in there?'

"I said, 'Yes.' I said, 'That isn't what I mean.' I said, 'Art's dead.'

"So we went back to the ambulance and I stood in the open door leaning against the front seat and told the conductor to take his light and show the ambulance driver how to get up to the cab. He didn't know the ladder was gone on my side. So I told him he would have to walk up the running board and take the ambulance driver and show them how to get up there and take a look at Art, I said, and make sure before we leave. So he did. And he came back, one of the ambulance drivers —I asked him, 'How did you find him?'

"He said, 'He never knew what hit him.'

"And they put me on the stretcher, put me in the ambulance and went to Sacramento."

He also testified: (R. 56)

"Q. Now, during the time that you were at or about the locomotive following this accident, Mr. Maasen, you at no time heard any outcry from the cab of the locomotive, is that correct?

"A. No, sir.

"Q. Or any sound of a human voice of any kind?

"A. No, sir."

Appellee introduced in evidence over objection of appellant a certified copy of death record (Plaintiff's Exhibit No. 26, R. 121) prepared by the Yolo County Health Department which states, inter alia:

"1a-I Disease or condition directly leading to death scalding burns over entire body when locomotive in which he rode crashed into another train.

"2A Date of death February 24, 1954. 2b Hour 2:30 a. m.

"22D Time of injury 2-24-54 2:30 a. m."

B. Damages from Loss of Financial Contributions

Appellee's decedent, Arthur V. Heavingham, was born on June 4, 1897 (R. 96) and consequently was slightly over 56 years and 8 months of age when he died on February 24, 1954. His widow and appellee, Mary V. Heavingham, was born on January 9, 1905, being slightly over 49 years of age at the time of decedent's death. The minor child, Kathleen Heavingham, was born on February 12, 1944, and was slightly over 10 years of age at decedent's death. (R. 96)

The life expectancy of a male aged 57 according to the American Experience Mortality Table is 16.05 years, and according to the United States Life Table is 16.98 years. The life expectancy of a female aged 49 under the above tables is respectively 21.63 years and 25.54 years. Under the same tables the life expectancy of a female aged 10 years is respectively 48.73 years and 60.85 years. (R. 71-72)

It was stipulated that during the year 1952 appellee's decedent earned $5,722.01 before payroll deductions, and in 1953 he similarly earned $5,574.34 (R. 94). For the calendar year 1953 decedent's net take home pay after payroll deductions was $4,493.13 according to the accounting records of appellant (R. 133). This figure approximates $375.00 per month.

Appellee's decedent was a trainman (R. 129). As of the middle of December, 1954, there were 4,090 trainmen in appellant's employment, 18 of whom were over age 70 (R. 130). In order to qualify for work over age 70 special restrictions upon trainmen must be met. They must undergo special physical examinations every three months and must have the recommendation of the superintendent that they are properly performing their duties and are alert and able to get up and down on the trains. (R. 130-131)

The average age of voluntary retirement of trainmen is between ages 66 and 67 (R. 131).

Decedent's duties frequently took him away from home (R. 106). The job which he held at the time of his death required that he be based in Roseville and be away from home five days a week. Whenever decedent's job required him to be away from home he lived at a hotel and took his meals wherever he was (R. 106-107). Appellee testified she did not believe decedent's personal expenses amounted to $100.00 per month (R. 108).

Appellee's actuary, Robert R. Drisko, testified concerning various formulae for computing the present value of decedent's future contributions to his dependents. These may be summarized as follows:

The cost of an annuity purchased from a private life insurance company (The Metropolitan Life Insurance Company) to provide $10.00 per month for the full life expectancy of a male aged 56 is $2,148.18 (R. 72-73, 82). To use this formula the desired monthly sum is divided by ten and the quotient is then multiplied by $2,148.18 (R. 82-83).

The present value[2] at 2½% interest to provide one dollar per month for the full life expectancy (16.05 years) of a male aged 57 is $158.65. At 3% interest the figure is $153.16 (R. 83-85). To use this method of computing present value one simply multiplies the desired monthly income by the amount in dollars for the desired interest rate, e.g., to provide an income of $100 per month for 16.05 years at 3% interest, the formula is 100 × 153.16, or $15,316.00 (R. 84).

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[2] "Present value" was defined by the actuary as "the sum of money, which if invested or deposited in a trust or bank would be just sufficient to provide monthly payments for the period stated, provided that the interest on the balance in the account was credited each year at the rate shown, and at the end of that period both principal and interest would be exhausted. (R. 83-84)

Factors to compute the present value of future income are available in a table called "Present Value of Annuity." By selecting the factor for the appropriate number of years and interest rate and multiplying the desired annual income thereby we arrive at the present value of such an annual income. The following is a table of factors to ascertain the present value of an annual income for from 8 to 13 years at rates of interest of 3%, 4% and 5% (R. 88-90).

Years	Factor at 3%	Factor at 4%	Factor at 5%
8	7.019	6.732	6.463
9	7.786	7.435	7.107
10	8.530	8.110	7.721
11	9.252	8.760	8.306
12	9.954	9.385	8.864
13	10.634	9.985	9.393

SPECIFICATION OF ERRORS

The errors which appellant specifies and upon which appellant relies as grounds for reversal are as follows:

1. The District Court erred in giving the following instruction to the jury:

> "There is a further issue in respect to damages that you will determine in this case. If you should find that between the time of the injury and the time of the death there was [180] an appreciable period of time in which the deceased, not as a mere incident of death or substantially contemporaneous with it, but while he was conscious and as a proximate result of such injury suffered pain, discomfort, fear, anxiety and other physical, mental and emotional distress, you will arrive at an amount that will be just compensation for such pain and suffering. I shall refer to that sum as general damages." (R. 149)

2. The District Court erred in refusing appellant's request to instruct the jury as follows:

"Defense Instruction No. 9.

"I instruct you that under the evidence in this case you may not include in your award any sum for conscious pain and suffering by the decedent." (R. 19-20)

Appellant duly excepted to both of the errors above specified as follows:

"Mr. Martin: If Your Honor please, I would like to make an exception on behalf of the defendant to the failure—to the giving of the Court's instructions going to the subject of conscious pain and suffering as an element of damage, and to the failure to give defense instruction, proposed instruction No. 9 which, in effect instructs the jury that there is no issue in this case on conscious pain and suffering, upon the grounds that under all the evidence in the case there was no such issue of fact to go to the jury on that question." (R. 156)

SUMMARY OF ARGUMENT

The general verdict of $75,000 undoubtedly included a substantial award for conscious pain and suffering of the decedent. This fact is apparent from a comparison of the total verdict with the range of amounts that the jury could, under the evidence, have awarded for the only objectively measurable element of damages, namely, the present cash value of financial contributions which the decedent would have made to his dependents, had he lived. Yet there is a complete lack in the record of any evidence sufficient to support any award whatsoever for conscious pain and suffering. Therefore the District Court committed reversible error in instructing the jury, over appellant's objection, that it might make such an award, and the District Court also committed reversible error in refusing to give the jury the instruction requested by appellant that the jury should not award any sum for conscious pain and suffering. An error in instructions to the

jury requires reversal unless it affirmatively appears that such error was harmless. Such an affirmative showing cannot be made here because the verdict could have included a substantial sum for the unsupported element of damages.

I.

THE VERDICT OF THE JURY WAS SO LARGE THAT IT UNDOUBTEDLY INCLUDED DAMAGES FOR CONSCIOUS PAIN AND SUFFERING BY DECEDENT

The possible causes of action provided by the Federal Employers' Liability Act (hereinafter referred to as the FELA) for the death of a railroad employee are found in two separate sections of the Act, §1 (45 USCA §51), enacted as part of the original Act on April 22, 1908, and §9 (45 USCA §59) added to the Act by amendment on April 5, 1910. Section 1 (45 USCA §51) provides, in the part pertinent here:

> "Every common carrier by railroad while engaging in commerce between any of the several states or territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her own personal representative, for the benefit of the surviving widow . . . and children of such employee . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . "

Section 9 (45 USCA §59), added later, provides:

> "Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow . . . and children of such employee . . . but in such cases there shall be only one recovery for the same injury."

In the leading case of *St. Louis, Iron Mountain & Southern Railway Company v. Craft,* 237 US 648, 59 L ed 1160 (1914) the Supreme Court of the United States declared and demonstrated that these sections provide two separate and distinct possible causes of action for the death of a railroad employee. The cause of action provided by §1 (45 USCA §51) is an action only for damages suffered by the designated members of the decedent's family, consisting of "compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased." (*Chesapeake & O. R. Co. v. Kelly,* 241 US 485, 36 S. Ct. 630, 60 L ed. 1117, 1122; *Michigan C. R. Co. v. Vreeland,* 227 US 59, 33 S. Ct. 192, 57 L ed. 417.) This cause of action for pecuniary loss arises at the time of death. (*Dusek v. Pennsylvania Railroad,* 68 F2d 131 (Circ. 7, 1933).) It was not until the Congress added §9 (45 USCA §59), two years after the enactment of the original Act, that the persons who had previously been given possible rights of action for the damage suffered by **survivors** from the **death** of the employee under §1 (45 USCA §51) were given an additional and distinct right to recover, upon proper showing, for the loss and suffering incurred **by the employee himself** between the time of his injury and the time of his death. (*St. Louis, Iron Mountain and Southern Railway Co. v. Craft,* 237 US at 656-658, 59 L ed at 1163-1164.)

In the present action the jury returned a general verdict of $75,000 under instructions which authorized them to award damages for pecuniary loss to appellee and her daughter, under §1 (45 USCA §51), and also (we think erroneously) to award damages for conscious pain and suffering claimed to have been incurred by the decedent between the time of his injury and the time of his death, under §9 (45 USCA §59). In this part of our argument we shall

show that the erroneous instruction given, and the erroneous refusal to give appellant's requested instruction, on the issue of conscious pain and suffering undoubtedly increased the size of the verdict. We shall make this showing by examining the range of amounts which the jury could, under the evidence, have awarded for the only tangible, or objectively measurable, element of damages authorized by the instructions of the court,—namely, the present cash value of financial contributions which the decedent would have made to his dependents. The difference between even the highest conceivable award for this tangible element and the total verdict is large enough that it **could** include an award for conscious pain and suffering. The difference between the total verdict and the range of amounts most reasonably supported by the evidence for this tangible element, is such that it very probably **did** include an award for conscious pain and suffering.

Necessarily, any financial contributions made by decedent to his dependents would have to come from his net take-home pay after deductions. *Wetherbee v. Elgin, Joliet & Eastern Ry. Co.,* 191 F 2d 302, 310-311, (Circ. 7, 1951). Decedent's take-home pay was slightly less than $4,500 per year or $375.00 per month during the calendar year 1953, the last full calendar year of his life. (R. 133) This was the income from which appellee and the surviving minor daughter, Kathleen, would have to receive their financial contributions from the decedent.

Whatever part of his earnings were used by decedent purely for his own maintenance would not, of course, be available to his dependents by way of contributions for their support and maintenance. Simply taking decedent's income, deducting his personal expenses and capitalizing the balance has been held error. (*Kansas City etc. Co. v. Leslie,*

238 US 599, 604, 59 L ed. 1478, 1483.) It is to be presumed that decedent himself would derive some benefits from his earnings over and above his own strictly personal expenses.

This record shows that decedent was frequently away from home in the course of his duties during which times he lived away from home and took all his meals away from home. (R 106-107) Appellee testified that she did not believe that the money which decedent took out of the family funds "for his own personal expenses such as meals, clothing, and that type of thing," amounted to $100.00 per month (R. 107-108). This figure seems very conservative in view of the well known present cost of living and the depreciated value of the dollar.

Under the formula provided by the actuary (R. 72-73, 82-83), the purchase of an annuity from the Metropolitan Life Insurance Company which would provide decedent's beneficiaries with an income of $275.00 per month during his entire life expectancy (16.05 years by one table, and 16.98 years by the other), i.e., until decedent would have reached age 72 or 73, would cost $59,974.95. We submit that this figure represents the highest possible limit of any conceivable loss of financial contributions by decedent's dependents.

Use of the figure of $275.00, out of a total take-home pay of approximately $375.00, as the monthly financial contribution of decedent carries with it the assumption that his own personal expenses, plus the portion of his family household expense which inured solely to his own benefit, amounted to only $100.00 per month. This calculation also carries with it the unlikely assumption that decedent would have worked until he reached his full life expectancy of 72 or 73 years of age, where in fact, the evidence showed that the average age of retirement of trainmen such as decedent

is between ages 66 and 67, and that only 4/10ths of 1% of trainmen work beyond age 70. (R. 130-131). This formula also disregards the fact that the minor child, Kathleen, would have reached her majority eleven years after decedent's death, or when decedent reached age 67. (R. 96). Of course, where a beneficiary is a minor child the period of minority is taken to limit the period during which, at least in the absence of some peculiar circumstance (and there was proof of none in this case), expectation of pecuniary benefits exists. (*Chicago etc. Co. v. Kelley,* 74 F 2d 80, (Circ. 8).)

Using the same formula discussed above, and considering that decedent's contributions to his beneficiaries amounted to ½ of his take-home pay, which in the absence of any other showing was the figure adopted by the Court in *Sabine Towing Co. v. Brennan,* 85 F 2d 478, 482 (Circ. 5) we arrive at a figure of $40,278.37 as the present value of future contributions. Under either of these assumptions, or the assumption of any intermediate figure between them, it is apparent that the award of $75,000.00 must include a substantial amount for elements of damage other than the contributions of decedent to his beneficiaries.

Using the factors supplied by the actuary and for purposes of clarity and convenience we have set forth in a table as an appendix hereto, the present value of 3 annual sums of money, $2400.00, $3000.00 and $3600.00, discounted at rates of 3%, 4% and 5% for expectancies of from 8 to 13 years, that is, for periods covering decedent's age from 64 years 8 months to 69 years 8 months. Examination of this table will show amounts representing the present value of a decedent's future contributions ranging from $15,511.00 which represents the present value of an annual income of $2400.00 at 5% interest for 8 years or until decedent would have reached age 64 years 8 months, to $38,282.00 which represents the present value of an annual sum of $3600.00 at

3% for a period of 13 years, or until decedent would have reached the age of 69 years 8 months.

Using the method of computation last referred to, even if we accept the largest of the sums thereunder, this would still allow $36,718.00 for elements of damages other than financial contributions of decedent to his beneficiaries.

As a matter of interest, the present value of $2400.00 a year for 16 years (decedent's full life expectancy) at 3% is $30,146.00; $3000.00 a year for the same period at the same interest is $37,683.00; and $3600.00 a year for the same period and at the same rate of interest is $45,219.00.

The net effect of all of these calculations is that the jury in awarding $75,000.00 as damages herein obviously made the allowance for elements other than decedent's financial contributions to his beneficiaries, and it cannot be said that they did not allow a substantial sum for the element of conscious pain and suffering, which under the evidence was not a proper issue of damages for consideration by the jury.

II.

APPELLEE FAILED TO SUPPORT HER CLAIM FOR DECEDENT'S CONSCIOUS PAIN AND SUFFERING BY THE NECESSARY PROOF OF A SUBSTANTIAL PERIOD OF CONSCIOUSNESS AND SUFFERING BETWEEN INJURY AND DEATH

The proof required to support a recovery for conscious pain and suffering of a deceased railroad employee under §9 of the FELA (45 USCA §59) was authoritatively defined by the United States Supreme Court in *St. Louis, Iron Mountain and Southern Railway Co. v. Craft,* 237 US 648, 59 L ed 1160 (1914). In that case, the railroad company, plaintiff in error, challenged the sufficiency of the evidence to support an award, made in the state courts below, for the conscious pain and suffering of the decedent between

the time of injury and his death. The Court found support for this award in evidence that the decedent survived for more than a half hour injuries which would cause extreme pain and suffering if he remained conscious, and that during this period of survival he was "groaning every once in a while" and "would raise his arm" and "try to pull himself." After stating that this evidence was sufficient, however, the Court felt constrained to add this comment:

> "But to avoid any misapprehension it is well to observe that the case is close to the border line, for such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here." 237 US at 655, 59 L ed at 1162.

The Court then cited *The Corsair (Barton v. Brown),* 145 US 335, 36 L ed 727 (1892). There a claim was made for the suffering prior to death of one Ella Barton, who was a passenger on a tug. It was alleged that from the time the tug struck the bank of the river to the time she sank, about ten minutes, and Ella Barton was drowned, the deceased suffered great mental and physical pains and shock and endured the tortures and agonies of death. These averments were held insufficient to show suffering which was "not substantially contemporaneous with her death and inseparable as a matter of law from it."

The rule of the *Craft Case* that to recover for conscious pain and suffering of a decedent under §9 of the FELA (45 USCA §59) plaintiff must affirmatively prove a substantial period, not merely contemporaneous with death, of (1) continuation of life, (2) injuries conducive to suffer-

ing and (3) continuation of consciousness, has been applied particularly in recent death cases under the Jones Act, 46 USCA §688, which grants the same rights of action for injury to or death of seamen as are granted by the FELA in the case of railroad employees. Thus in *Stark v. American Dredging Company,* 66 F Supp 296 (E. D. Pa. 1946), there was held to be no right of recovery for any conscious pain or suffering of a seaman who was thrown into the water when a rowboat capsized and was not seen alive thereafter but whose body was recovered from the water about a half hour later.

Similarly in *Smith v. United States,* 121 F Supp 778 (S. D. Tex. 1953), aff'd sub. nom. *United States v. Smith,* 220 F 2d 548 (Circ. 5, 1955) recovery was denied under the Jones Act for the alleged pain and suffering of a seaman who fell into the water from the side of a ship striking a dock on the way down. The Court said of the claim for pain and suffering, 121 F Supp at 784-785:

> "The record shows that Smith is dead as a result of his fall with the ladder. But **it would be a mere guess** to say when he died, or whether his death was caused from striking the dock or drowning or both. If the time of his death was known and shown, there would I take it be both mental and physical suffering by him from the time he began to fall until his death. But as the record stands, **the only certain period of mental and physical suffering** is from the time he began to fall until he struck the dock, and the amount of damages, if any, recoverable therefor would be a mere guess. I do not think Libellant, under this record, is entitled to recover therefor." [Emphasis supplied.]

The Court clearly recognizes, in the foregoing language, that it could allow recovery only for a "certain" period of suffering and could not allow anything for any period as to which suffering would have been a "mere guess." The Sixth

Circuit Court of Appeals applied the same principle in *Cleveland Tankers Inc. v. Tierney,* 169 F 2d 622 (1948) in which it denied recovery for claimed pain and suffering of seamen of the crew of a barge which was lost, with the entire crew, in a storm on Lake Erie. The Court said, 169 F 2d at 626:

> "The record is devoid of evidence from which a Court could determine that the various decedents endured pain and suffering before they died."

The statement last quoted is precisely applicable to the record now before this Court. The record shows that the decedent was standing in a locomotive cab in which there occurred an impact strong enough to throw another occupant of the cab, fireman Maasen, out the window; that immediately thereafter the cab was filled with steam so thick and so hot that Maasen, an experienced railroad man, could not penetrate into the cab; and that when the steam was cleared away, the decedent was found dead inside the cab. (R. 31-35)

There is absolutely no evidence of decedent's condition between the time of impact and the final gaining of access to the decedent's body. The surrounding circumstances, like the surrounding circumstances in the drowning cases cited above, all point to an extremely brief, or non-existent period of consciousness following the injury, certainly not one of any substantial duration. Even conceding, arguendo, some sort of artificial presumption of a continuation of life, there is certainly no room for any presumption, or even inference, that the decedent remained **conscious** for any appreciable time after the impact.[3] It is of course well settled that there

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[3] The only one present at the scene of the accident who appears to have expressed any opinion as to whether any period of consciousness followed the impact of the locomotive and caboose, was the ambulance driver, who said, "He never knew what hit him." (R. 35).

is no right under the FELA to recover for pain and suffering of a decedent who remained unconscious during the time that he survived his injury. (*New Orleans and N. E. R. Co. v. Harris,* 247 US 367, 62 L ed 1167 (1918); *Great Northern Railway v. Capital Trust Co.,* 242 US 144, 61 L ed 208 (1916).)

Appellee introduced into evidence, over the strenuous objection of appellant, a document pertaining to decedent entitled "Certified Copy of Death Record." (R. 121) Appellee's stated purpose in introducing this document was to put before the jury the statement therein that the cause of the decedent's death was "scalding burns over entire body when locomotive in which he rode crashed into another train." (R. 112) Appellant objected to this evidence as without probative value because of a complete lack of any independent evidence of survival beyond the time of impact. (R. 110, 114) We think that the admission of this evidence over this objection was error, though we do not specify such error as ground for reversal. But even if any conscious pain or suffering could properly be inferred, which we do not concede, from the phrase in the death record, "scalding burns over entire body," any such inference would be completely nullified by entries in the very same death record fixing the date and hour of death and the date and hour of injury **both** at 2:30 a. m. on February 24, 1954. The document would thus fall within the established rule that evidence which is both consistent with the existence of an element of damage and also consistent with its non-existence tends to establish neither. (*May Department Stores Co. v. Bell,* 61 F 2d 830, 842 (Circ. 8, 1932).)

In the first part of our argument (pp. 13-18, supra) we demonstrated that the verdict in this case was of such magnitude that the jury could have, and very probably did,

include in its award a substantial sum for conscious pain and suffering. The authorities discussed in this, the second part of our argument, when applied to all the evidence in the record conceivably relevant to possible conscious pain and suffering by the decedent, show a complete lack of legally sufficient evidence to meet appellee's burden of proof on this issue. It remains to demonstrate that under these circumstances, the giving of the instruction specifically authorizing the jury to include this element of damage in its award, and the refusal to instruct the jury that it should not consider this element, all excepted to by appellant, constituted error prejudicial to appellant and require that the judgment below be reversed and the case remanded for a new trial.

III.

AUTHORIZING THE JURY TO CONSIDER CONSCIOUS PAIN AND SUFFERING WAS REVERSIBLE ERROR

Under the federal cases it is reversible error to submit to the jury an element of damages not supported by material evidence.

May Department Stores v. Bell, 61 F 2d 830 (Circ. 8, 1932), was a personal injury case in which the plaintiff claimed as one element of damage a tubercular condition alleged to have been induced by lowered bodily resistance brought about by injury of the plaintiff's foot and ankle in defendant's escalator. The trial court had instructed the jury that it could consider plaintiff's tubercular condition in awarding damages. The Eighth Circuit Court of Appeals held that the evidence of any causal connection between the injury and the tubercular condition was speculative and insufficient and, upon the sole ground of error in submitting this element of damage to the jury, reversed the judgment

and remanded the case for a new trial on the issue of damages.

The same court, in the earlier case of *Chicago M. & St. P. Ry. v. Holverson,* 264 Fed 597, held it reversible error to authorize the jury to include in a personal injury award damages for a particular alleged injury not supported by sufficient evidence.

This Court, in *Union Oil Co. of California v. Hunt,* 111 F2d 269, reversed a judgment awarding damages for personal injury on a closely similar ground. In that case there was put before the jury evidence of pain and suffering arising out of an injury incurred prior to the injury being sued upon, and the Court gave instructions which could easily be construed as authorizing an award of damages for pain and suffering from the prior injury. In reversing on this ground, this Court quoted language from 15 Am. Jur. 410, "Damages," §20, which is very pertinent here:

> "The damages recoverable in any case must be susceptible of ascertainment with a reasonable degree of certainty, or, as the rule is sometimes stated, must be certain both in their nature and in respect of the cause from which they proceed."

This Court, sitting in bank in *Southern Pacific Company v. Guthrie,* 186 F 2d 926 (Circ. 9, 1951), cert. den. 341 US 904, 95 L ed 1343, undertook a comprehensive review of the power of a federal appellate court to modify a judgment based on a verdict for damages for personal injuries on account of excessiveness of the amount of the award. In the course of its discussion the Court made the following preliminary observation, pertinent here: (186 F 2d at 926).

> "We put to one side those cases in which it can be demonstrated that the verdict includes amounts allowed for **items of claimed damage of which no evi-**

> **dence whatever was produced.** Such total want of evidence upon a portion of the case would give rise to a question of law in the same manner in which a question of law is presented when, upon motion for a directed verdict, there appears an insufficiency of evidence as to the whole case. There is no such want of evidence here." [Emphasis supplied.]

In the first part of our argument (pp. 13-18, supra) we demonstrated that in all probability the jury included in its verdict an amount for an "item of claimed damages of which no evidence whatever was produced," i.e., conscious pain and suffering. Under no view of this case can it be said that the jury did *not* make a substantial award for this unsupported item. It is the established rule of the federal appellate courts, well settled by a long line of cases, that where, over the defendant's objection, there have been submitted to the jury two or more possible alternative grounds on which it can base a verdict for the plaintiff, and one or more of those grounds is not sufficiently supported by evidence, a judgment for plaintiff must be reversed. The reason given for this rule by the Courts is that obviously the Court has no way of knowing whether the verdict was based on the proper ground or on the erroneous ground, and because it may have been based on the erroneous ground the judgment based on such verdict must be reversed.

The leading case in the United States Supreme Court applying this rule is *Wilmington Star Mining Co. v. Fulton,* 205 US 60, 51 L ed 708 (1907). That was a wrongful death action in which eight counts of negligence were pleaded. It was held that the trial court had committed error in overruling the motions of the defendant to strike the second, third and sixth counts of negligence and in refusing the

defendant's request to instruct the jury that there was not sufficient evidence to support a recovery on those counts. The Court further stated that it was impossible to say that this error was not prejudicial and the judgment below for plaintiff was reversed on that ground.

Decisions reversing judgments on verdicts for plaintiffs on the ground that one or more, but less than all, of the alternative bases of liability submitted to the jury lacked sufficient evidentiary support, have been found in the United States Courts of Appeal for the following circuits:

Second Circuit: *Christian v. Boston and Maine Railroad,* 109 F 2d 103 (FELA death action); *Erie Railroad Co. v. Gallagher,* 255 Fed 814 (FELA action).

Fourth Circuit: *Baltimore & Ohio Railroad Co. v. Deneen,* 161 F 2d 674, subsequent judgment affirmed, 167 F 2d 799; *Atlantic Coast Line v. Tiller,* 142 F 2d 718, rev'd on other grounds, 323 US 574, 89 L ed 465 (FELA action).

Sixth Circuit: *Detroit, T. and I. Railroad v. Banning,* 173 F 2d 752, 755, cert. den., 338 US 815, 94 L ed 493 (FELA action); *Pennsylvania Railroad Co. v. Stegaman,* 22 F 2d 69; *Baltimore & Ohio Railroad Co. v. Reeves,* 10 F 2d 329 (characterizing this rule as "the established federal rule"); *Buckeye Cotton Oil Co. v. Sloan,* 250 Fed. 712, 722, subsequent judgment rev'd 272 Fed. 615. The language in *Pennsylvania Railroad v. Stegaman,* supra, decided in the Sixth Circuit in 1927, indicates how strictly the rule is to be applied. The Court, after having found substantial evidence to support the first of three grounds of negligence submitted to the jury as basis for liability, declared in 22 F 2d at 70:

> "It is more or less probable, perhaps very likely, that the jury would have found negligence upon the first ground stated, if neither of the others had been

submitted; but they might not. Their conclusion may be based upon either the second or the third ground; and, if there was error in submitting either of these, there must be a reversal. We are compelled to find that there was error in both respects."

Eighth Circuit: *Chicago & Northwestern Railway Co. v. Garwood,* 167 F 2d 848 (FELA action); *Roth v. Swanson,* 145 F 2d 262, 269; *Chicago St. P., M. and O. Railway v. Kroloff,* 217 Fed. 525.

In several of the above cases, as well as in *Wilmington Star Mining Co. v. Fulton,* supra, itself, the reversible error consisted not merely in submitting particular unproven grounds of liability to the jury, but in refusing specific instructions to the jury that they should **not** consider certain unsupported grounds of liability. (*Baltimore and Ohio Railroad v. Deneen,* 161 F 2d 674 (Circ. 4, 1947); *Erie Railroad v. Gallagher,* 255 Fed. 814 (Circ. 2, 1918); *Buckeye Cotton Oil Co. v. Sloan,* 250 Fed. 712, 722 (Circ. 6, 1918); *cf. Chicago and Northwestern Railway v. Garwood,* 167 F 2d 848 (Circ. 8, 1948); *Chicago St. P., M. and O. Railway v. Kroloff,* 217 Fed. 525 (Circ. 8, 1914).) On the same principle, it was reversible error in the case at bar to refuse appellant's requested instruction that the jury should not include any sum for conscious pain and suffering in an award of damages to appellee. (R. 20) Such an affirmative instruction is necessary for the guidance of the jury where the jury's attention has been called to the possibility of such an element of damage, as in this case where appellee attempted to inject the issue of conscious pain and suffering through the introduction of the death certificate. (R. 121)

The rule of *Wilmington Star Mining Co. v. Fulton,* supra, applied in these various cases, from the Second, Fourth, Sixth and Eighth Circuit, has also been recognized in the

First Circuit and in our own Ninth Circuit, although no case has been found in the latter two circuits in which the Courts had occasion to apply the rule to reverse a judgment. In *Parker v. Gordon,* 178 F 2d 888, 895 (Circ. 1, 1949), the Court cited the rule, but found that both the alternative grounds of liability had been properly submitted to the jury and therefore affirmed the judgment below. In the first opinion in *Southern Pacific Company v. Guthrie,* 180 F 2d 295, 297, this Court stated the argument of the appellant in that case that either or both of the two charges of negligence submitted to the jury was unsupported by evidence, and that if either of the two claims was unsupported by evidence, the judgment must be reversed for the reason stated in *Wilmington Star Mining Co. v. Fulton,* supra, since it cannot be known on what ground the jury returned its general verdict for plaintiff. The opinion of the Court then proceeded to examine both charges of negligence and to find both supported by evidence in the record, an examination that would have been unnecessary if the Court had felt that evidentiary support merely of either one of the charges was sufficient to sustain the judgment for plaintiff.

In *Southern Pacific Company v. Kauffman,* 50 F 2d 159, this Court stated that if the appellant (defendant below) had made a motion or requested an instruction to withdraw a particular count of negligence, not supported by the evidence, from the jury, such a motion or request should have been granted (citing *Wilmington Star Mining Co. v. Fulton,* supra), but that such a motion or request had not been made. However, the Court also found error in excluding, over appellant's objection, certain evidence which would tend to counteract the charge of negligence erroneously submitted to the jury, and held that since the charge of negligence had in fact been submitted without supporting

evidence, the exclusion of appellant's evidence counteracting the charge was prejudicial as well as erroneous.

The only federal appellate case found contrary to *Wilmington Star Mining Co. v. Fulton,* supra, that is, refusing to reverse a judgment where not all of the alternative grounds of liability submitted to the jury were supported by evidence and the error in submitting particular unsupported grounds to the jury had been properly preserved by motion or request for instructions, is *Stephenson v. Grand Trunk Western Railroad,* 110 F 2d 401 (Circ. 7, 1940), cert. granted, limited to different question, 310 US 623, 84 L ed 1395, cert. dismissed, 311 US 720, 85 L ed 469. In that case the Seventh Circuit Court of Appeals was of the opinion that it was bound by the rule of the Illinois state court that a judgment for plaintiff must be affirmed on appeal if any one of the counts of negligence submitted to the jury is supported by evidence even though the court, over proper objection, also submitted to the jury other counts not supported by evidence upon which the verdict could have been based. As authority that the state practice controlled in this matter, the Court cited the old case of *Bond v. Dustin,* 112 US 604, 28 L ed 835 (1884). With deference to the Seventh Circuit Court of Appeals, we think that its decision to follow a rule of Illinois appellate practice contrary to the established federal rule was wrong, and even if not wrong at the time of the decision, it is certainly wrong today. *Bond v. Dustin,* supra, the old case relied upon, held that the old "Conformity Act" (then R. S. §914, later former title 28 USC §724) required that a federal circuit court sitting in Illinois apply, **in its trial practice**, an Illinois statutory rule that a general verdict given on several counts in a declaration should not be set aside if it is supported by one or more of those counts even though other counts in

the declaration failed to state a cause of action. Of course the Conformity Act made state procedures applicable only in the federal **trial** courts and never had any application to federal **appellate** proceedings which "are governed entirely by the acts of Congress, the common law, and the ancient English statutes." (*Camp v. Gress,* 250 US 308, 318, 63 L ed 997, 1003 (1918).) And certainly the question whether error in submitting to the jury an issue unsupported by evidence is or is not prejudicial and ground for reversal on appeal is a question of appellate, not trial practice. Moreover, Congress repealed the Conformity Act by the Act of June 25, 1948, c. 646, §39, 62 Stat. 869, as amended, May 24, 1949, c. 139, §141, 63 Stat. 109, 28 USCA "§§2281 to end of text" p. 342. Since the Conformity Act has been repealed, and since the present action is one under a federal statute, there is no possible ground for applying any other than federal rules of law in determining whether error committed in the district court constitutes ground for reversal of the judgment.

In one respect the case at bar presents an even stronger case for reversal than did *Wilmington Star Mining Co. v. Fulton,* supra, and the cases following it. In those cases it was held reversible error to submit to the jury, without sufficient supporting evidence in the record, one of several alternative grounds of liability on the **same cause of action.** Here the unsupported claim erroneously submitted—for conscious pain and suffering of the decedent—would, if established, constitute by itself an **independent** cause of action which survived for appellee's benefit under §9 of the FELA (45 USCA §59), **separate and distinct** from appellee's other asserted cause of action for pecuniary loss to the surviving beneficiaries of the decedent, arising under §1 (45 USCA §51). (See pp. 13-14, supra.)

IV.

THE FEDERAL "HARMLESS ERROR" STATUTE DOES NOT ALTER THE RULE THAT ERRORS IN JURY INSTRUCTIONS ARE PRESUMPTIVELY PREJUDICIAL, AND REQUIRE REVERSAL ABSENT AN AFFIRMATIVE SHOWING THAT THEY ARE HARMLESS

The scope of those errors in proceedings leading to a judgment in a United States District Court which will **not** constitute ground for reversal on an appeal taken from such judgment to a United States Court of Appeals is defined by §2111 of title 28, USCA:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

This section, enacted May 24, 1949, is practically identical to the second sentence of §269 of the former judicial code (former 28 USC §391) enacted February 26, 1919.

The United States Supreme Court has repeatedly held that this section "does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." (*McCandless v. United States,* 298 US 342, 347-348, 80 L ed 1205, 1209 (1936), reversing judgment in condemnation action for error in excluding evidence of particular use to which land could be put and instructing jury to ignore possibility of such use.)

In *United States v. River Rouge Co.,* 269 US 411, 421. 70 L ed 339, 346 (1926) the judgment in a condemnation suit was reversed for error in instructing the jury that it should not consider certain benefits to the defendant land

owner as offsetting the damages awarded. The Court there declared that the rule that error relating to the substantial rights of the parties is ground for reversal without an affirmative showing of harmlessness is especially applicable when the error is embodied in the charge to a jury.

In *Fillippon v. Albion Vein Slate Co.,* 250 US 76, 82, 63 L ed 853, 856 (May, 1919), cited with approval in both *McCandless v. U. S.,* supra, and *U. S. v. River Rouge Co.,* supra, the Court used even stronger language, saying:

> "And, of course, in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

The same rule is quoted and invoked in *Thomas v. Union Railway Co.,* 216 F 2d 18 (Circ. 6, 1954) and *Majestic v. Louisville & N. R. Co.,* 147 F 2d 621 (Circ. 6, 1945).

In the present case the errors in submitting to the jury the question of damages for conscious pain and suffering and of refusing to instruct them to ignore such damages could not be harmless unless it **affirmatively appeared** that the jury had not included such damages in its verdict of $75,000.00. Obviously such affirmative showing cannot be made on this record. The figures in the record pertaining to the anticipated earnings of the decedent, the work expectancy of the decedent and the present value of financial contributions which decedent might have made to plaintiff and her daughter, discussed above (pp. 15-18, supra), show that the jury may well have awarded a very substantial sum for conscious pain and suffering under the instructions of the Court.

CONCLUSION

There is no evidence to support any award to appellee of any sum for conscious pain and suffering, and appellant was prejudiced by the probable inclusion in the general verdict, under an erroneous instruction and in the absence of a requested instruction erroneously refused, of a substantial sum for this claimed element of damage. These prejudicial errors in instructing the jury require that the judgment below be reversed.

Dated: November 15, 1955.

A. B. Dunne
John W. Martin
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Attorneys for Appellant

(Appendix Follows)

APPENDIX

PRESENT VALUE OF $2,400.00, $3,000.00 AND $3,600.00, DISCOUNTED AT RATES OF 3%, 4% AND 5% FOR EXPECTANCIES OF FROM 8 TO 13 YEARS:

Years	Decedent's Age	Rate of Interest	Annual Contribution in Dollars	Present Value
8	64 years, 8 mths.	3%	2,400.	16,845.
		3%	3,000.	21,057.
		3%	3,600.	25,268.
		4%	2,400.	16,156.
		4%	3,000.	20,196.
		4%	3,600.	24,235.
		5%	2,400.	15,511.
		5%	3,000.	19,389.
		5%	3,600.	23,266.
9	65 years, 8 mths.	3%	2,400.	18,686.
		3%	3,000.	23,358.
		3%	3,600.	28,029.
		4%	2,400.	17,844.
		4%	3,000.	22,305.
		4%	3,600.	26,766.
		5%	2,400.	17,056.
		5%	3,000.	21,321.
		5%	3,600.	25,585.
10	66 years, 8 mths.	3%	2,400.	20,472.
		3%	3,000.	25,590.
		3%	3,600.	30,708.
		4%	2,400.	19,464.
		4%	3,000.	24,330.
		4%	3,600.	29,196.
		5%	2,400.	18,530.
		5%	3,000.	23,163.
		5%	3,600.	27,595.
11	67 years, 8 mths.	3%	2,400.	22,204.
		3%	3,000.	27,756.
		3%	3,600.	33,307.
		4%	2,400.	21,024.
		4%	3,000.	26,280.
		4%	3,600.	31,436.
		5%	2,400.	19,934.
		5%	3,000.	24,918.
		5%	3,600.	29,901.

Years	Decedent's Age	Rate of Interest	Annual Contribution in Dollars	Present Value
12	68 years, 8 mths.	3%	2,400.	23,889.
		3%	3,000.	29,862.
		3%	3,600.	35,834.
		4%	2,400.	22,524.
		4%	3,000.	28,155.
		4%	3,600.	33,786.
		5%	2,400.	21,273.
		5%	3,000.	26,592.
		5%	3,600.	31,910.
13	69 years, 8 mths.	3%	2,400.	25,521.
		3%	3,000.	31,902.
		3%	3,600.	38,282.
		4%	2,400.	23,964.
		4%	3,000.	29,955.
		4%	3,600.	35,946.
		5%	2,400.	22,543.
		5%	3,000.	28,179.
		5%	3,600.	33,814.